



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.09.2021

CORAM:

THE HONOURABLE MS.JUSTICE P.T.ASHA

WEB COPY

A.S.No.367 of 2017 and

C.M.P.No.13821 of 2017

Jagadeesh Chandra S.Davey

...Appellant/Plaintiff

Vs

1.V.Velu

2.K.Venkatesan

...Respondents/Respondents

PRAYER Appeal Suit filed under Section 96 r/w Order 41 Rule 1 of the Code of Civil Procedure to set aside the decree and judgment dated 05.08.2016 passed in O.S.No.3487 of 2015 by the learned III Additional Judge, City Civil Court, Chennai.

For appellant : Mr.V.Balasubramanian

For respondents : No appearance

JUDGMENT

The unsuccessful plaintiff has filed this appeal, challenging the dismissal of the suit for recovering of money in O.S.No.3487 of 2015 on the file of the learned III Additional Judge, City Civil Court, Chennai.

2.Plaintiff Case:-

It is the case of the plaintiff that the first defendant, who was engaged in real estate business had approached the plaintiff along with the second defendant who is none else than his father-in-law to provide financial assistance. Accordingly, the plaintiff had agreed to provide financial assistance subject to the second defendant standing guarantee/ surety for the repayment of the said sum.

3.On the aforesaid agreement, between the periods 18.06.2012 to 22.02.2014 the first defendant had in all borrowed a sum of Rs.10,04,000/- on various dates and had executed a promissory note for each of those loans and the said promissory note was counter signed by the second defendant in his capacity as a surety. The interest payable under each of the demand promissory notes varied from 36% to 60% depending upon the profits made by the first defendant in his business.



4.The plaintiff would submit that till the month of September 2014, the first defendant was servicing the interest without default. Thereafter, the payment of interest was stopped. The defendants assured that they would pay a sum of Rs.10,04,000/- together with interest on or before 31.12.2014. However, the promise was observed in breach. The plaintiff's legal notice dated 30.04.2015 also did not evoke any reply or payment from either of the defendants. Therefore, left with no other alternative, the plaintiff has come forward with the suit in question.

5.Defendants set ex-parte:

Though both the respondents/defendants were served through Court as well as privately on 06.09.2017 and 23.08.2017 respectively, they did not take steps to appear in person or to be represented by the learned counsels. A perusal of the decree of the lower Court indicates that though the defendants had originally entered appearance through a learned counsel, they have not filed their written statements and they were set ex-parte and an ex-parte order came to be passed.

6.Trial Court:

The appeal has been filed challenging the exoneration of the second defendant from his liability. The learned trial Judge after holding that the first defendant was liable to repay the amount due under all the promissory notes, has dismissed the claim against the second defendant. The learned Judge held that the second defendant has signed as a surety in Exs.A1 to A14, A17 to A18/Promissory notes and he has signed below the word surety. However, in Exs.A15 and A16 the word surety is missing. The learned Judge has held that the second defendant cannot be mulcted with the liability since the documents does not reflect that the second defendant has undertaken to pay the plaintiff in the event of the first defendant failing to repay the amounts. The learned Judge would submit that just the use of the word surety was contrary to the Provisions of Section 126 of Indian Contract Act. On this ground, the suit against the second defendant has been dismissed.

7.Point for consideration:

The only point for consideration that arises in the appeal is "whether the second defendant can be held jointly and severally liable to repay the amounts due under the decree to the plaintiff, in his capacity as a surety?"

8.Discussion:

The trial Court has dismissed the suit against the second



defendant only on the ground that the signature of the second defendant in Exs.A1 to A14, A17 and A18 was simply as a surety without there being express words that the second defendant was binding himself to the liability of the first defendant. The learned Judge has held that this is contrary to the provisions of Section 126 of Indian Contract Act. A reading of Section 126 would indicate that the contract of the guarantee, surety etc., can either be oral or written. In the instant case, the second defendant has counter signed the promissory notes which has been given by his son-in-law/the first defendant to the plaintiff. He has signed the said document fully comprehending the fact that he was standing guarantee for the dues of the first defendant. Further, despite receiving the legal notice that was issued by the plaintiff dated 30.04.2015 on 11.05.2015, the second defendant has not come forward to deny the plaintiff's case. This assume significances as in the said notice, a post-script had been added to the notice addressed to the second defendant which reads as follows:

"The above notice is self explanatory. In respect of the borrowings under pronotes from SI.No.1 to 18 you have stood as surety for your son-in-law who is the addressee of the notice. Since you have stood as surety you are also equally liable to pay to my client so far as outstanding due under pronotes under SI.No.1 to 18 are concerned with interest amounting to Rs.13,16,064/-.

Take notice that if you failed to pay the said sum within 14 days to my client and if my client is forced to proceed legally then in that case my client will be compelled to initiate legal proceedings against your son-in-law Mr.Velu and in that case my client will be forced to initiate legal proceedings against you also holding you responsible for all costs and consequences thereto in your capacity as surety."

9.The above details would clearly shows that the plaintiff had called the second defendant as a guarantor/surety for the loan borrowed by the first defendant and had also held that he would be liable to make good the payments, in case, the first defendant has failed to make the payments. Despite receiving the said notice the second defendant has not sent a reply denying this claim of the plaintiff. Therefore, the learned Judge has totally misdirected himself in coming to the conclusion that the second defendant cannot be held liable and thereby, dismissing the suit against him. In the course of the argument, the learned counsel for the plaintiff had informed



this Court that besides the suit there were 8 other suits against the defendants herein, all of which have been decreed in toto. Be that as it may, considering the fact that the reasoning given by the learned Judge for dismissing the suit against the second defendants is unsustainable, the point is answered in favour of the appellant. Consequently, the First Appeal is allowed with costs and the judgment and decree of the learned III Additional Judge, City Civil Court, Chennai in O.S.No.3487 of 2015 is set aside in so far as the suit is dismissed against the second defendant. The suit is decreed as prayed for and connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS-I)

//True Copy//

Sub Assistant Registrar

vkr

To

The III Additional Judge,
City Civil Court, Chennai.

Copy To

The Section Officer,
VR Section,
High Court, Madras.

+4cc to Mr.V.Balasubramanian, Advocate SR.No.48840

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GJ(CO)
GN(19/01/2022)